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Supreme Court of the United States.

October Term, 1923.

UNITED STATES OF AMERICA, *Appellant*,
v.
CHARLES J. FERRIS, *Appellee*. } No. 217.

BRIEF OF AMICUS CURIAE.

MORRISON SHAFROTH,
Amicus Curiae.

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BRIEF OF AMICUS CURIAE.

POINTS AND AUTHORITIES.

I.

In order to entitle claimant to additional pay, the order under which he exercises the higher command must be indispensable to the exercise of the command:

United States v. *Mitchell*, 205 U. S. 161.
Walker v. *United States*, 43 C. Cls. 1.
Humphreys v. *United States*, 38 C. Cls. 689.

II.

Operations against the enemy can not be restricted to the immediate battlefield. In a great war all military activities of troops from mobilization to fighting are a part of the necessary military operations against the enemy. This is the settled construction of international law.

United States v. *Mitchell*, 205 U. S. 161.
General Orders No. 86, U. S. Army, July 2, 1898.
Walker v. *United States*, 43 C. Cls. 1.
22 Opns. Atty Gen. 95 and 96.
Pierce v. *United States*, 252 U. S. 239.
Article 44 of the Hague Regulations of 1899.

Proceedings of the Hague Peace Conference, 1917, prepared under the direction of James Brown Scott and published by the Oxford University press in 1922, page 118.

International Law, chiefly as interpreted and applied by the United States, by Charles Cheney Hyde, page 384, Sec. 699, Vol. 2.

BRIEF OF THE ARGUMENT.

STATEMENT.

The claim of appellee arises under Section Seven of the act of April 26, 1898 (30 Statutes, 364, 365, C. 191), reading as follows:

> "That in time of war, every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The attempt of the Government to so limit the interpretation of the term "troops operating against an enemy" to apply only to troops while they are actually being fired upon, or are actually pursuing the enemy, is so novel and so contrary to the theory upon which our armies were mobilized and the war waged to a successful conclusion that this case is of peculiar interest to all service men.

I.

AN ORDER MUST BE NECESSARY TO ENABLE THE COMMAND TO BE EXERCISED.

The law is well established that an officer in order to be entitled to the pay of the higher grade must not only exercise the command under orders, but the orders

must have been actually necessary in order to enable him to exercise the command. In other words, the command must not be such that without any orders at all he would succeed to the command by reason of the mere fact that he was the senior officer, properly assigned to and left in command of the unit. Such a case is one where, in the absence of his captain, the first lieutenant, serving with and assigned to the company, succeeds by seniority and without orders to the command of the company.

United States v. *Mitchell*, 205 U. S. 161.
Walker v. *United States*, 43 C. Cls. 1.
Humphreys v. *United States*, 38 C. Cls. 689.

In this case the Court of Claims has found since appellee was not assigned to the 315th Regiment, Field Artillery, but was merely attached, that he could not succeed to the command of that regiment without an assignment in orders issued by competent authority. Assuming this to be the case, the sole remaining question is whether or not these troops which were being organized and training at Camp Lee, Virginia, during the period in question, were "troops operating against an enemy" within the meaning of the statutes.

II.

OPERATIONS AGAINST THE ENEMY CAN NOT BE RESTRICTED TO THE IMMEDIATE BATTLEFIELD. IN A GREAT WAR ALL MILITARY ACTIVITY OF TROOPS, FROM MOBILIZATION TO FIGHTING ARE A PART OF THE NECESSARY MILITARY OPERATIONS AGAINST THE ENEMY. THIS IS THE SETTLED CONSTRUCTION OF INTERNATIONAL LAW.

It would seem that the construction of the term "troops operating against an enemy" has been long since conclusively settled. The act in question was passed during the Spanish-American War, and almost immediately after the passage of the act the Attorney General gave an opinion which was promulgated to the Army in General Orders No. 86 as follows:

> "HEADQUARTERS OF THE ARMY,
> "Adjutant General's Office,
> "Washington, July 2, 1898.
>
> "1. In paragraph seven of the Act 'For the Better Organization of the Line of the Army of the United States,' approved April 26, 1898 (30 Stat. at L. 365, Chap. 191, U. S. Comp. Stat. 1901, p. 895), it is provided 'That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.'
>
> "The Attorney General has held that this clause 'was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain.' But that 'all service in the Army at the present is not to be considered as operating against an enemy.' Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to carry on the war with Spain, would not be within the meaning of the Act."

This interpretation, as far as I have been able to find, has never since been disputed by any court, nor questioned in any decision. Under this interpretation,

claims by the score have been paid. With this interpretation undisputed, practically all of the cases decided on this question have gone to judgment. In the case of the *United States* v. *Mitchell*, 205 U. S. 161, the point is not even mentioned, though the service in that case was with troops within the United States and not in Cuba. The same thing is true in the case of *Walker*, 43 C. Cls. 1. The opinion of the Attorney General, 22 Opins. 95, 96, lays down the broad principle that the true test of whether troops fall within the meaning of the term "operating against an enemy" is whether or not they have been assembled for carrying on the general purposes of the war. He used this language:

> "I think also that, while assembled at camps in the United States, such as I have named, any troops of the army assembled for the present war purposes, can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life, drill, discipline, and other preparation. The assembling of such troops, their drill, discipline and equipment, while assembled in the military bodies, are all a part of the same general war purposes."

There can be no legitimate distinction between troops which are being mobilized and trained for active service against the enemy and troops which are already thoroughly trained and merely awaiting orders to move on to the firing line. Every division and every soldier in the United States and abroad during the late war, when not actually on the firing line, was in training for combat service. Modern war develops constantly new methods of warfare, and troops, even at the front, are actively engaged in training to meet these developments of war. This is illustrated in General Persh-

ing's report to Secretary Baker made November 20, 1918, where he says:

> "During our period of training in the trenches some of our divisions engaged in local combat * * * ."

The Government in a succeeding case to this, *Lanagan* v. *United States*, claims that the men were engaged in training for combat services during all of the time they were in camp, during the time they were being transported to and across France, and until the very day they came to the front and engaged in actual firing upon the enemy, and that, consequently, not until that day could they be deemed to be taking part in the military operations of our Government against the enemy.

Surely a construction, so unjust, so out of accord with the spirit in which the act of Congress has been interpreted in all the years before; so out of accord with the unity of spirit which must prevail in the conduct of war, which makes every soldier a part of the active military forces of the United States; so out of accord with logic and reason, ought not to be permitted to prevail in this court, unless forced by fixed and certain rules of construction.

It is common knowledge and a matter of history that it was only lack of transportation that prevented the transportation to Europe of all of the army long before they were actually sent. The fact that divisions continued to train up to the time that transportation was ready does not in any way alter the fact that these divisions constituted troops regularly trained, drilled and assembled in camps, and potential units in any combat operations with the enemy. All troops, when not engaged in actively fighting, are in training, receiving instruction. Troops drawn out of the trenches

and taken back for a short period of training, instruction and rest, surely could not be held not to be operating against the enemy, merely because, when they were not actively firing upon and bayoneting their foe, they were receiving instruction in the modern methods of warfare.

In some wars it might be possible that certain troops could be considered as not operating against the enemy. That could not be true of the Great War. If the United States were engaged in a war against Panama or Honduras, which required nothing but a small force of marines to quell it, it would be quite evident that the other troops in the United States were not mobilized for the purpose of fighting the war in Honduras and so could not be said to be participating in any general operations against the enemy. But in a war which required every ounce of strength that the Government could rally, the very first operation against the enemy, undertaken by this Government, was the mobilization of its forces in camps for the purpose of training, equiping and sending them overseas. The next operation was their concentration at port; then their movement to the front. Every one of these things constituted operations against the enemy in the broad sense of that term.

The first military operations in the World War by Russia and Germany were the mobilization of their troops, and practically the first step in the great military operations of the American Government was the mobilization of its drafted men in camps preparatory to sending them overseas.

The term "military operations" or "troops operating against an enemy" can have a liberal or a narrow interpretation. Take the act of June 15, 1917, by which t was made a crime to make false reports or statements,

"With intent to interfere with the operation or success of the military or naval forces of the United States."

The United States Supreme Court, in the case of *Pierce* v. *United States*, 252 U. S. 239, affirms the decision of the lower court, sentencing the defendant under this act for the circulation of pamphlets, which the court held might interfere with the operation or success of the military or naval forces of the United States. Certainly in the narrow sense, no pamphlet, circulated in the United States, could interfere with the troop movements on the front in France. But taken in its broad sense, by interfering with mobilization, enlistment, etc., even the circulation of pamphlets might be with intent to and was held to be with intent to interfere with the military operations of the United States. That this is the ordinary interpretation is shown by the fact that ARTICLE 44 OF THE HAGUE REGULATIONS OF 1899 USED THIS LANGUAGE: "IT IS FORBIDDEN TO FORCE THE POPULATION OF OCCUPIED TERRITORY TO TAKE PART IN MILITARY OPERATIONS AGAINST ITS OWN COUNTRY." This is but a codification of the long standing rule of war, which forbids, for any purpose, the enforced enlistment, in the army of the belligerent, of the inhabitants of the enemy country. Surely no one would contend that under the above article a belligerent could for any purpose force the population of occupied territory into its army, even though the portion of the army into which the inhabitants were enrolled was not to be used directly on the firing line.

In the proceedings of the Hague Peace Conference of 1917, prepared under the direction of James Brown Scott, and published by the Oxford University Press in 1922, in discussing this question of the use of the

inhabitants of an occupied country, Major-General Yermolow, the Russian representative there, used this language at page 118: "To this explanation of my honored colleague, from Austria-Hungary, I request permission to add that in so far as concerns the service of enemy ressortissants in the ranks of the enemy, it is already forbidden by Article 44 of the Convention * * * ."

The prohibition against employing inhabitants, in operations of war against their own country, as meaning that under no circumstances can they be forced into the ranks of the army, whether that army is in training merely or engaged in active fighting, has been the universal construction given to that term in International Law.

It goes even further than that. Charles Cheney Hyde, at page 384, Sec. 699, Vol. 2, of his recent work, "International Law, Chiefly as Interpreted and Applied by the United States," uses this language:

"THE PROHIBITION AGAINST FORCING THE INHABITANTS TO TAKE PART IN THE OPERATIONS OF WAR AGAINST THEIR OWN COUNTRY PRECLUDES, HOWEVER, ACCORDING TO THE RULES OF LAND WARFARE, THE REQUISITIONING OF THEIR SERVICE UPON WORKS DIRECTLY PROMOTING THE ENDS OF WAR, SUCH AS THE CONSTRUCTION OF FORTS, FORTIFICATIONS AND ENTRENCHMENTS."

In other words, International Law has adopted the same interpretation as to the meaning of the term "military operations," as was promulgated in General Order No. 86 on July 21, 1898, and as was adopted by the Attorney General, who in 1898 held that the true

test was whether or not the one general war purpose was being furthered.

Not only the reasonableness of the matter, but the very fact that the opinion of the Attorney General, heretofore stated, has stood unchallenged for more than twenty years, while claim after claim was being paid under that interpretation is clearly indicative of the weakness of the Government's position in this case, and shows that in this case, under any reasonable interpretation, claimant was serving with troops operating against the enemy during the entire period of his claim.

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